No. 17315

United States
COURT OF APPEALS
for the Ninth Circuit

SAFEWAY STORES, INCORPORATED,
Appellant,

v.

MARVIN FANNAN,
Appellee,

and

MARVIN FANNAN,
Appellant,

v.

SAFEWAY STORES, INCORPORATED,
Appellee.

BRIEF OF APPELLANT MARVIN FANNAN

Appeals from the United States District Court for the District of Oregon.

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BASIS OF JURISDICTION

This is a diversity action, brought in the Oregon state court and removed to the District Court for the District of Oregon upon the ground of diversity of citizenship. It is stipulated in the pre-trial order, which superseded

the pleadings (R. 8), that plaintiff is a citizen and resident of the State of Oregon, and that defendant is a corporation organized and existing under the law of the State of Maryland with its principal place of business in the State of California and in no other state (R. 3-4). It is also stipulated that the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs (R. 3), plaintiff's prayer being for $50,000.00 general damages plus special damages (R. 5-6).

Jurisdiction of the District Court was based upon Title 28, U.S.C. § 1332. Removal was based upon the provisions of Title 28, U.S.C. § 1441 (a).

The cause came on regularly for trial before the Honorable William G. East, District Judge, who entered a judgment of dismissal in favor of defendant on November 16, 1960 (R. 9-10). On December 28, 1960, plaintiff and defendant each filed separate notices of appeal, together with undertakings for costs on appeal (R. 14-15).

This Court has jurisdiction of the appeal under the provisions of Title 28, U.S.C. § 1291.

STATEMENT OF THE CASE

This is an action for damages for personal injuries suffered by plaintiff in slipping on a pencil while a business invitee in defendant's store in Tillamook, Oregon (R. 4-5). At the close of plaintiff's testimony, defendant made a motion for an order directing the jury to return a verdict in its favor (R. 54), and, after

hearing argument, the Court granted a dismissal (R. 61) and subsequently entered the judgment which is the subject of this appeal (R. 9). Defendant has also appealed from this judgment, claiming that it should have been entered with prejudice, but this brief, in accordance with the stipulation entered into in this Court with respect to the order of filing briefs, deals only with plaintiff's appeal from the judgment of dismissal.

The only issue on this appeal, therefore, is whether the trial court erred in dismissing plaintiff's case without submitting it to the jury. It is not entirely clear from the court's comments at the time of granting the motion whether he relied upon the absence of any evidence of negligence, or upon contributory negligence as a matter of law, both of which were grounds for the motion made by defendant (R. 54).

Plaintiffs contends that under applicable Oregon law, and the standards for submission of issues to the jury in federal courts under the provisions of the Constitution of the United States, a question for the jury's decision was clearly presented on both of these issues.

SPECIFICATION OF ERROR

The Court erred in granting defendant's motion made at the close of plaintiff's case, as follows (R. 54):

> "Mr. Tooze. If your Honor please, at this time the plaintiff having rested his case, the defendant moves the Court for an order directing the jury to return a verdict in favor of the defendant for the reasons

and on the grounds that there is no evidence proving or tending to prove that the defendant was negligent in any of the particulars claimed by the plaintiff, or at all; that there is no evidence proving or tending to prove that any act or conduct on the part of the defendant was a proximate cause of any injuries or damages sustained by the plaintiff; on the further ground that the evidence affirmatively shows that the conduct of the plaintiff himself in not paying attention where he was going was negligence as a matter of law which proximately contributed; toward causing his accident and injuries. I would like to argue the motion, your Honor."

After colloquy and argument, the Court stated that he was granting a motion for dismissal (R. 61), and a judgment of dismissal was subsequently entered (R. 9-10).

SUMMARY OF ARGUMENT

The evidence in this case established that plaintiff slipped and fell by reason of stepping on a pencil, lying in the aisle of defendant's store. Plaintiff and his sister were the first and only customers in the store that morning. It must necessarily follow, therefore, either that the pencil had been there all night, a sufficient length of time for the defendant to have discovered it, or, if it had not been there all night, that it had been dropped there by a Safeway employee. Accepting plaintiff's testimony as true, these are the only two possible conclusions. Whichever of them was accepted by the jury, an inference of negligence could properly be drawn therefrom.

The question of whether plaintiff was guilty of contributory negligence in failing to keep a proper lookout was clearly for the jury under applicable law. Plaintiff testified that he was going up the aisle looking for supplies, and stepped on the pencil, which he had not seen.

There being evidence from which the jury could have found negligence on the part of the defendant and an absence of contributory negligence on the part of the plaintiff, the court was in error in taking the case from the jury and dismissing plaintiff's cause of action.

ARGUMENT

A. Statement of Facts.

The facts of this case are simple, and the record extremely short. It is stipulated that defendant is a Maryland corporation, owning and maintaining a store in the City of Tillamook, Oregon (R. 4), and that on or about November 30, 1959, plaintiff fell while a business invitee in said store (R. 4). The evidence established that plaintiff and various members of his family went to the store at about 9:00 or 9:30 in the morning (R. 53-54), just briefly before the store opened (R. 17). They drove to the store (R. 17), where plaintiff and his brother-in-law looked at a truck right across the street from the store until the store opened (R. 17). Plaintiff's sister waited in the car, and advised them when the store opened (R. 17). At the time that plaintiff and his brother-in-law went across the street

to look at the truck, the door of the store had not yet been unlocked (R. 28).

Plaintiff and his sister were the first patrons to enter the store (R. 21, 28). They did not see any other patrons in the store at any time from the time they entered it until they left (R. 21, 28).

Plaintiff and his sister both walked in the door, went through the turnstile, and started up one of the aisles toward the meat market. His sister was in the lead, because plaintiff stopped briefly to pick up some supplies (R. 17-18, 26-27). As plaintiff was heading down the aisle toward the rear of the store, he slipped and fell (R. 18, 27), with his left leg crumpled underneath him (R. 27). The ball of his left foot had struck an object, which rolled backward under it (R. 23-25).

Both plaintiff and his sister identified the object upon which plaintiff stepped as a pencil, which they saw spinning down the aisle immediately after plaintiff fell (R. 19, 29-30). Both plaintiff and his sister saw it while it was still spinning (R. 19, 30). It was a black, shiny pencil, described as round and pretty heavy, with a little screw apparatus on top (R. 20, 30). The manager told the meat man to go pick up the pencil, because one man had already been hurt (R. 29-30), and the meat man picked it up and give it to the manager, who put it in his pocket with some other pencils (R. 20, 29-30).

At no time did plaintiff nor his sister see anyone in the store other than themselves and Safeway employees (R. 21, 28), and plaintiff's sister testified that she was not carrying any kind of pencil with her when she went into the store (R. 28).

The deposition of another witness, Walter R. Steinsiek, who was too disabled to appear in court (R. 39), was also introduced in evidence. This witness had apparently been brought into the case in some manner by the Safeway personnel (R. 37, 41). He had been in that Safeway Store on the day in question (R. 35), but he testified that it was between 10:00 and 11:00 (R. 36), that he positively did not drop any pencils in the store that day, and that all of his pencils were present and accounted for (R. 38). There were three or four others in the store when this witness was there (R. 42), and he produced at the time of the deposition the same pencils that he had at the time plaintiff was injured (R. 43-46).

B. There was substantial evidence that defendant was negligent.

In determining whether or not the evidence in this case was sufficient to go to the jury, it hardly requires reiterating that the applicable standard of examination of the record in a case of this type is that stated by this court in *Sullivan* v. *Shell Oil Company,* 234 F.2d 733, 735 (C.A. 9, 1956), cert. den. 352 U.S. 925, 77 S. Ct. 221, 1 L. Ed. 2d 160, as follows:

> "Upon appeal from a judgment of dismissal entered upon the close of all the evidence, the appellant is entitled to the benefit of every inference which can reasonably be drawn from the evidence viewed in the light most favorable to the cause of action asserted. *Gunning* v. *Cooley,* 1930, 281 U.S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720; *Schnee* v. *Southern Pacific Co.,* 9 Cir., 1951, 186 F. 2d 745, 746; *Graham* v. *Atchison, T. & S. F. Ry. Co.,* 9 Cir.,

1949, 176 F.2d 819, 823; *Kingston* v. *McGrath,* 9 Cir., 1956, 232 F. 2d 495."

The reason for this rule is inherent in the requirement of jury trial. As the United States Supreme Court stated in the case of *Lavender* v. *Kurn,* 327 U.S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916 (1946):

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

By this standard, or by any other standard, for that matter, there are only two inferences which are reasonably deducible from the record. Since plaintiff and his sister were the only customers in the store, and did not themselves drop the pencil, either the pencil was dropped by Safeway personnel, or else it had been there since the previous day. From either of these alternatives, an inference of negligence may clearly be drawn, under the applicable authority.

If one of defendant's employees dropped the pencil, it is clear that the defendant can be held liable for

their conduct, even without proof of the length of time which the pencil had been on the floor. Two extensive annotations on the subject of debris on the floor and obstacles on the floor appear at 61 A.L.R. 2d 6 and 110, collecting some of the thousands of cases that have discussed these issues. At pp. 24 and 124, this rule is stated, and cases cited in support thereof.

> "Thus, it has been said that matters as to notice, including questions as to the length of time the dangerous condition existed are eliminated where it appears that the condition was created by defendant or persons for whose conduct he is responsible."[1]

The same rule is, of course, followed in Oregon. When the condition of the floor of the premises is the result of the act of defendant or its agents and employees, knowledge of the condition is automatically imputed to the defendant. See *Saunders* v. *Williams & Co.*, 155 Or. 1, 11, 62 P.2d 620 (1936); *Hesse* v. *Mittleman,* 145 Or. 421, 423, 27 P.2d 1022 (1934).

The latest expression of the Supreme Court of Oregon on this subject is in *Miller* v. *Safeway Stores,* 219 Or. 139, 153, 312 P.2d 577, 346 P.2d 647 (1959), wherein the court stated:

> "In this case we are not called upon to decide if defendant had knowledge that the boxes were in the aisle. The defendant admits that the boxes were

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[1] Among the cases cited is *Vogue, Inc.* v. *Cox,* 28 Tenn. App. 344, 190 S.W. 2d 307 (1945), in which plaintiff stepped on a pencil lying near a counter, and fell. A saleslady immediately picked it up and said, that is my pencil, and stuck the pencil in her hair.

In the instant case, the manager ordered the pencil picked up, and, when it was handed to him, put it in his pocket with a group of pencils.

placed there by defendant's employees and that they contained merchandise of the defendant, probably soap, to be placed upon the shelves. This imputes knowledge."

Finally, Mr. Steinsiek testified that his own pencil, Exhibit 6E, which was similar to the type of pencil described by plaintiff and his sister, was not a common type of pencil, and was the same type used for making the banners that Safeway uses in its stores, which were made by an employee right in the Tillamook store (R. 46-47). This evidence would be sufficient to take to the jury the issue of whether or not the pencil was a Safeway pencil, and hence presumably dropped by a Safeway employee. See discussion in *Eitel* v. *Times,* 221 Or. 585, 597-598, 352 P.2d 485 (1960).

Thus, in this case, we have evidence of the nature of the pencil and of the conduct of the Safeway employees with respect to it immediately after the accident tending to prove that the pencil was dropped by a Safeway employee, coupled with the fact that Safeway employees were the only ones in the store or who had been in the store up until the time that plaintiff fell. The irresistible conclusion from plaintiff's testimony is that if the pencil was there only a short time, it was dropped by a Safeway employee. Knowledge was therefore imputed to the defendant.

The only other alternative from the evidence was that the pencil had been there since before the store opened that morning. If the pencil had been there the night before, it would seem clear, even under the very Oregon case relied upon by the defendant in its motion for

non-suit, that there was sufficient evidence of constructive notice to go to the jury. In *Cowden* v. *Earley,* 214 Or. 384, 387, 327 P.2d 1109 (1958) the traditional Oregon rule is stated as follows:

> "The rule of law applying to a case of this kind is well established. An invitee who is injured by slipping on a foreign substance on the floor or stairs of business property must, in order to recover from the occupant having control of said property, show either:
>
> (a) That the substance was placed there by the occupant,or
>
> (b) That the occupant knew that the substance was there and failed to use reasonable diligence to remove it, or
>
> (c) That the foreign substance had been there for such a length of time that the occupant should, by the exercise of reasonable diligence, have discovered and removed it."

If the pencil had been in that place since the night before, the conditions of paragraph (c) above have certainly been met. A store owner, in the exercise of reasonable diligence, should be able to find a foreign object on his floor in that time. And, as above demonstrated, if the object had not been on the floor since the night before, the case must necessarily come within the requirements of paragraph (a) or paragraph (b), because the pencil must necessarily have been dropped by a Safeway employee.

We presume that defendant will concede that a large round pencil on the floor of the store is an object which is a danger to customers. See the case of *Vogue, Inc.* v. *Cox,* supra, p. 9, n. 1; compare, *Lucas* v. *City of*

Juneau, 168 F. Supp. 195 (D.C. Alas., 1958) in which the court held that there was no evidence that defendant was responsible for the presence of a pencil on the floor, but stated:

> "* * * There could be little doubt that its presence as such on the floor of the store would tend to create a hazard as to the customers."

In summary then, plaintiff submits that his evidence clearly establishes that the case must fall into one of two alternatives: Either the pencil had been there long enough for defendant's employees, in the exercise of reasonable care, to have found it and removed it, or, if it had not been there long enough, it could only be because it had been dropped by one of defendant's employees. In either case, a jury question was presented with respect to defendant's negligence.

C. Whether plaintiff was guilty of contributory negligence was for the jury.

It is a little difficult to determine, from the comments of the trial court, exactly what the basis of the court's ruling is. At one point he expressed himself as being interested in "who caused the creation." (R. 59). At another point, he indicated that the plaintiff had the same responsibility with respect to using due care that the defendant did and that since he hadn't seen the pencil, there was no reason for the Safeway people to have seen it (R. 60). Finally, he indicated that the issue of causation was such that "I have never seen a plainer case that was more speculative in the causation of the accident than this case." (R. 61). Although the law on

the subject seems to be perfectly clear, discussion of contributory negligence is in order, since contributory negligence as a matter of law was a ground of the defendant's motion, and in view of the trial court's remarks.

Plaintiff's testimony was (R. 18):

> "A. Well, I was—I just—Well, like I was goin' up the aisle lookin' for supplies and I just slipped and fell."

In numerous cases, the Oregon Supreme Court has held that evidence similar to this raises a jury question on the issue of contributory negligence. In fact, so far as plaintiff is aware, the Oregon Supreme Court has never held that a customer in a store was guilty of negligence as a matter of law in slipping on a foreign substance.

In *Miller* v. *Safeway Stores,* supra, 219 Or. at pp. 257-258, plaintiff testified, "I was just looking where I was going and I was looking at the shelves and shopping just like anyone else does in these stores." The Court held that it was for the jury to decide whether she was giving adequate attention, under the circumstances, to her feet. In *Lopp* v. *First National Bank,* 151 Or. 634, 639, 51 P.2d 261 (1935), the Court stated:

> "The patrons of the business having occasion to enter the building have a right to assume that this duty [to keep the floor ordinarily safe to walk upon] has been complied with or discharged, notwithstanding that the condition of the floor could have been seen if the patron 'exercised a reasonable alertness'."

In that case, plaintiff's testimony had been that she "glanced at the floor and then glanced up to find a desk." A judgment of non-suit was reversed.

In a similar situation, in *Hovedsgaard* v. *Grand Rapids Store,* 138 Or. 39, 53-54, 5 P.2d 86 (1931), plaintiff was an employee who slipped on a grease spot on a stairway. When asked whether he had looked at the stairway to see what the conditions were, he stated, "I just went up, that is all." He admitted that had he looked he might have seen the grease spot. The Court held:

> "It cannot be said that as a matter of law the plaintiff was negligent in not looking at each step of the stairway in question. The question is one for the jury. In the absence of notice to the contrary, the plaintiff had a right to assume that the stairway provided for his use in going to his work, and that of the other workmen in going to theirs, would be reasonably safe."

Most recently, in *Shepard* v. *Kienow's,* 70 Or. Adv. Sh. 1073, 71 Or. Adv. Sh. 451, 351 P.2d 700, 356 P.2d 147 (1960), opinion on rehearing, the Court held:

> "In our former opinion it was said that the plaintiff's failure to look at the floor upon entering the store constituted contributory negligence. Proof that plaintiff failed to look at the floor does not establish that she was negligent as a matter of law. Whether plaintiff's failure to examine the floor constituted contributory negligence was a matter for the jury."

In his remarks in ruling upon the motion for nonsuit, the Court indicated that since plaintiff and his sister had not seen the pencil, there was no reason to

expect that the defendant could have seen the pencil either. This statement ignores two basic propositions. In the first place, the defendant had hours in which to find the pencil, whereas plaintiff and his sister were simply walking down the aisle. In the second place, defendant had a duty to keep the store reasonably safe for its customers, which included a duty to inspect the aisles to determine whether their condition was safe. Planitiff had no duty to inspect the aisles; he was merely required to walk with reasonable care, and whether he did so was a question for the jury. The case of *Miller* v. *Safeway Stores,* supra, contains a discussion of the use of "attention arresters" and various other merchandising devices in self-service stores, which is relevant to this issue. It would be disastrous to defendant's business if all its customers spent their time in the store looking at their feet instead of at the displays used for the purpose of inducing customers to purchase. In that case, the Court also referred to the duty of the defendant to warn, stating:

> "If she should have been alerted to the probability of an obstacle at the spot where she could anticipate moving to or standing in when reaching the shelf was for the jury to decide."

Contributory negligence, therefore, like negligence, was for the jury to determine.

D. In diversity cases, what constitutes a jury question is governed by federal law.

What has gone before has largely been presented as if predicated upon the assumption that Oregon law governed the question of whether a sufficient case was made

out for jury decision. The Oregon Court itself, however, has noted that the standard applied by it for determining sufficiency of the evidence to go to the jury is not as favorable to the plaintiff as is applied in the federal courts, specifically citing *Lavender* v. *Kurn,* 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1945) as setting a more liberal standard than is applied in Oregon. *Eitel* v. *Times, Inc.,* 221 Or. 585, 593, 352 P.2d 485 (1960). As has been demonstrated, even under the more stringent Oregon standard, a jury case was made out. It is clear, however, that even in diversity cases, the applicable standard is the federal standard. *Smith* v. *Buck,* 245 F.2d 348, 349 (C.A. 9, 1957); *Allen* v. *Matson Navigation Company,* 255 F.2d 273, 281-282 (C.A. 9, 1958). Although the rule is not followed in all the circuits, the carefully reasoned and well supported dissent of Judge Pope in *Trivette* v. *New York Life Ins. Co.,* 283 F.2d 441, 443 (C.A. 6, 1960) estabishes that not only the Ninth Circuit, but the great weight of federal authority adheres to the rule that the Seventh Amendment to the United States Consitution governs this issue.

CONCLUSION

Plaintiff submits that under the evidence presented to the trial court, he was entitled to the trial by jury guaranteed to him by the Constitution of the United States and the Federal Rules of Civil Procedure. The judgment of the court below should be reversed, and the cause remanded in order that plaintiff may have his case submitted to the jury for decision.

Respectfully submitted,

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